

FALSE ADS: THERE OUGHTA BE A LAW! —OR, MAYBE NOT

Here's a fact that may surprise you: candidates have a legal right to lie to voters just about as much as they want.

That comes as a shock to many voters. After all, consumers have been protected for decades from false ads for commercial products. Shouldn't there be "truth-in-advertising" laws to protect voters, too?

Turns out, that's a tougher question than you might imagine.

For one thing, the First Amendment to the U.S. Constitution says "Congress shall make no law . . . abridging the freedom of speech," and that applies to candidates for office especially. And secondly, in the few states that have tried laws against false political ads, the laws haven't been very effective.

BOGUS PSYCHICS & TWIRLING BALLERINA DOLLS

Laws protecting consumers from false advertising of products are enforced pretty vigorously. For example, the Federal Trade Commission (FTC) took action in 2002 to protect the public from the self-proclaimed psychic "Miss Cleo," whom the FTC said promised free readings over the phone and then socked her gullible clients with enormous telephone charges. The FTC even forced a toy company a while back to stop running ads showing its "Bouncin' Ballerina" doll standing alone and twirling gracefully without human assistance, which the FTC said was video hokum.

But there's no such truth-in-advertising law governing federal candidates. They can legally

lie about almost anything they want. In fact, the Federal Communications Act even requires broadcasters who run candidate ads to show them uncensored, even if the broadcasters believe their content to be offensive or false.

This is taken very seriously. In a 1972 case, the Federal Communications Commission forced stations in Atlanta, GA to accept a paid political ad from J.B. Stoner — a self-proclaimed "white racist" running for the U.S. Senate on the National States Rights party ticket. The NAACP objected to Stoner's ad because it said the "main reason why niggers want integration is because niggers want our white women." The FCC sided with Stoner, citing freedom of speech decisions of the Supreme Court.

Stations can reject ads for any reason from political groups other than candidates. And they may reject ads from all candidates for a given office. But if they take ads from one candidate they can't legally refuse ads from opponents, except for technical reasons (such as being too long or short to fit standard commercial breaks, or if the recording quality is poor) or if they are "obscene." Rejecting a candidate's ad because it's false is simply not allowed.

So what gives? Surely the public stands to suffer more damage from a presidential candidate lying about his opponent than from a bogus psychic. Isn't the process of choosing the leader of the most powerful nation on the planet a more important matter than whether some doll really does what the TV ads show?

Yes. But . . .

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For one thing, the First Amendment guarantee of free speech poses a big obstacle to enacting or enforcing such laws – which it should. The very idea of self-government rests on the idea that voters – given enough uncensored information – can best decide who should be in power and who should not. So free speech applies first and foremost to candidates. As the U.S. Supreme Court said unanimously in a 1971 libel case, “it can hardly be doubted that the constitutional guarantee (of free speech) has its fullest and most urgent application precisely to the conduct of campaigns for political office.”

So states have found it hard to enact laws against false political advertising, and even harder to make them work.

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The ad was false. Even if Jude’s proposed legislation had been enacted it could not possibly have prevented the crime it described. Reason: Jude’s bill would have applied only to persons imprisoned for offenses committed on or after August 1, 1987, and the convict mentioned in the ad had been sentenced in 1983.

Jude lost the election, but the ad may have had an effect. His losing margin was only 549 votes out of more than 200,000 cast.

It was Jude’s misfortune, however, to live in one of the very few states that outlaws false political advertising. A special prosecutor presented the case to a grand jury, which indicted Jude and his campaign manager. A conviction could have led to a year in jail and a \$3,000 fine.

MINNESOTA: THE CASE OF THE FURLOUGHED RAPIST

Example: In a 1994 House race in Minnesota, Republican candidate Tad Jude ran an emotion-packed ad against Democrat William Luther in the final weekend of the race.

It was reminiscent of the notorious “Willie Horton” ads run against Democratic Presidential Candidate Michael Dukakis in the 1988 Presidential election. In the ad, Jude cited the case of a woman and two daughters who were kidnapped and raped repeatedly over two days by a man who had been released from prison on a furlough.

Jude’s ad claimed the rapist “never would have been released and this crime never committed” if Democrat Luther, a state senator, had not blocked a bill sponsored by Republican Jude, who was also a state senator. “Sending (Luther) to Congress would be a crime,” it concluded.

PROBLEMS WITH ENFORCEMENT

The trial judge later threw the case out, however, and the Minnesota Court of Appeals refused to reinstate the indictment against Jude. In its opinion, the appeals court said that the Minnesota law was too broad, allowing someone to be charged for having only “reason to believe” that an ad they helped prepare was false. The court said that U.S. Supreme Court rulings required a higher standard: evidence of “actual malice.” To convict, prosecutors would have to prove Jude either knew the ad was false, or acted with “reckless disregard” for whether it was true or not. That would have been a tough job; Jude had testified to the grand jury that he was under the false impression that the ad was true, that the rapist named in the ad had been convicted later of a second offense that would have made him subject to the legislation he had proposed. So

Jude went free and, in fact, ran against Luther a second time in 1996. This time Luther won with nearly 56% of the vote.

This case exposes two problems with relying on truth-in-advertising laws to protect voters from campaign falsehoods. First, prosecutors can't move quickly enough to cure the damage caused by a last-minute, false attack. Jude wasn't indicted until more than a year after the election that he almost won. And second, under the "actual malice" standard a candidate could lie profusely in ads and still get away with it by claiming he or she thought the ads were true, so long as no convincing evidence surfaced to the contrary.

WASHINGTON STATE: THE CASE OF THE KILLER OPHTHALMOLOGISTS

Washington state also ran into problems trying to enforce its own truth-in-political-advertising law after a 1991 ballot referendum fight. At issue was a proposed "death with dignity" law. A group opposed to it, the "119 Vote No! Committee," issued a leaflet saying that if the proposal passed "It would let doctors end patients' lives without benefit of safeguards . . . your eye doctor could kill you."

The ballot proposition failed, and the state's Public Disclosure Commission brought an action charging the 119 Committee with

violating the state's law against false political advertising. The commission said the proposal did contain standards and it was false to say it would open the door to killer ophthalmologists. But the trial court dismissed the charges in this case, too, and the Washington State Supreme Court later struck down the law under which the committee had been charged.

The Supreme Court's majority opinion questioned whether state government officials had any right to substitute their judgment for that of the voters in matters of political speech. Quoting earlier court opinions, it said:

"Instead of relying on the State to silence false political speech, the First Amendment requires our dependence on even more speech to bring forth truth The First Amendment exists precisely to protect against laws such as (the Washington state truth-in-advertising law) which suppress ideas and inhibit free discussion of governmental affairs..."

And so it goes. All this should tell voters that—legally—it's pretty much up to them to sort out who's lying and who's not in a political campaign. Nobody said democracy was supposed to be easy.

It is of course the job of news organizations to assist; that's why the First Amendment guarantees a free press as well as free speech. We at FactCheck.org try hard to help. But on Election Day, it's up to you.

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